



michigan municipal league

Law Enforcement Action Forum Newsletter

December 2014 Edition



Volume 21, Issue 4

Thoughts About Body Worn Cameras

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One of the most popular additions to the police collection of equipment is the body worn camera. It is being touted by civil rights and law enforcement organizations as the best thing since the implementation of in-car camera and portable audio recording devices. The idea is transparency and openness so the public can see what police officers do. Right now, many of these organizations believe that the body worn cameras are what police should have to meet this perceived demand by the public for verification of police activity.

LEAF has consistently supported the use of recording devices to capture real time police activity as a means of explaining the reason for the actions officers take. In the case of body worn cameras, the visual recordings reach much farther into the personal lives of the people that officers encounter, even in a casual way, than the in-car systems do because they are portable and go with the officer in to areas that previously were private. With this new capability, departments must evaluate how they do business and determine what responsibilities they have under the law for protecting the dignity and privacy of subjects and other individuals they encounter. LEAF recommends that before using body worn cameras, department executives should consider the many factors that affect their body worn camera program as well as evaluate the cost and risk to the department and the exposure to the public they serve.

This issue of the LEAF Newsletter will discuss a variety of issues that law enforcement should consider before implementing a body worn camera program. These issues include use, effectiveness, purpose, privacy, and statutory compliance. Other considerations are the cost of and the technology needed to review and evaluate the recordings to protect private or confidential information and still comply with any Freedom of Information Act requests.

Research And Their Recommendations

In 2014, the Police Executive Research Forum, with support from the U.S. Department of Justice's Office of Community Oriented Policing Services (COPS), published the results of their research on police departments adopting and using body worn cameras in a document entitled *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. In a letter introducing the publication, Chuck Wexler, Executive Director, Police Executive Research Forum, very pointedly comments that:

If police departments deploy body-worn cameras without well-designed policies, practices, and

training of officers to back up the initiative, departments will inevitably find themselves caught in difficult public battles that will undermine public trust in the police rather than increasing community support for the police.

The research is well worth reading and provides significant suggestions and considerations that police executives should review prior to adopting a body worn camera program. Additionally, the Office of Justice Programs (OJP) Diagnostic Center and COPS supported another research document published in 2014 by Michael D. White entitled *Police Officer Body-Worn Cameras: Assessing the Evidence*. This document reviews the current evidence on the challenges and benefits of body-worn video camera technology to help law enforcement executives understand the costs and benefits to the law enforcement community of using body worn camera technology. It also provides a broad view of the experience that departments in the United States and the United Kingdom have had when using body worn cameras. The research is frank in the recognition of positive impacts and concerns that need to be addressed. This is a study that law enforcement executives should read if they are considering implementing a body worn camera program.

The International Association of Chiefs of Police has published a model body worn camera policy that is a good starting point for the development of a customized policy for a department. Department executives must decide how they are going to handle those issues identified in the various publications, particularly the discretion officers have in activating the camera in different situations or environments.

In a Police One.Com news article from the Force Science Institute entitled *Destroying Myths & Discovering Cold Facts* (Minnesota State University-Mankato, Sept. 23, 2014), Executive Director Bill Lewinski, PhD, said; "There's no doubt that body cameras — like dash cams, cell phone cams, and surveillance cams — can provide a unique perspective on police encounters and, in most cases, are likely to help officers. But like those other devices, a camera mounted on your uniform or on your head has limitations that need to be understood and considered when evaluating the images they record."

Lewinski went on to say, "Certainly, a camera can provide more information about what happened on the street. But it can't necessarily provide all the information needed to make a fair and impartial final judgment. There still may be influential human factors involved, apart from what the camera sees." He then listed ten limitations to keep in mind when evaluating body worn camera recordings. The list provides a good understanding of limitations of these and other recordings when trying to determine what actually occurred in an incident.

The Americans for Effective Law Enforcement (AELE) have compiled a list of body worn camera resources found at www.aele.org/bwc-info.html. The list includes a variety of materials that can provide a police executive interested in establishing a body worn camera program with a great deal to consider. Information on the subject of body worn cameras will continue to evolve rapidly, and law enforcement executives should consider their policies as living documents until legislative initiatives and/or court decisions define any subjects in controversy.

Issues and Controversy

An issue of considerable concern is the number of police departments that are jumping on the body worn camera bandwagon without adopting a policy that guides officers with the department's expectation of use and defines the discretion officers have in using the device. Departments must also consider their communities' philosophy about widespread recording of police activity as well as privacy and the requirements of the law or regulation. Finally, police departments should consider is the cost of digital storage of the recordings and the expense and difficulty in complying with statutes concerning privacy and release of the media.

To get a feel for the areas that are currently issues of concern for the use of body worn cameras, LEAF turned to its Legal Advisor, Audrey Forbush, Plunkett Cooney PC for her thoughts on the areas department executives should evaluate prior to adopting a body camera program. She pointed to the ongoing research and guidance that professional and governmental organizations are publishing as a guide to national trends and policy issues. She also thinks that gathering the viewpoint of the municipal leaders, citizens and employees concerning the expected outcome of initiating a program is crucial. Of paramount importance, according to Forbush, is issuing a policy that requires specific performance and accountability. Second to the policy, she said, is training officers so they clearly understand management's expectations and any limitations on discretionary use.

Eavesdropping

Michigan is an "all party consent" state when it comes to recording conversations or surveillance. MCL 750.539c makes it a felony for any person to willfully eavesdrop on a conversation without the consent of all parties. Luckily, the legislature, in their infinite wisdom and forward thinking, added MCL 750.539g(a), Exceptions, that state: Sections 539a to 539f do not prohibit eavesdropping or surveillance not otherwise prohibited by law by a peace officer of this state or of the federal government, or the officer's agent, while in the performance of the officer's duties. So, as long as the officer is not violating some "otherwise prohibited" law, they may eavesdrop and record in places or situations that the public cannot. Forbush cautioned that a Fourth Amendment violation is of particular concern when evaluating the "otherwise prohibited" language for compliance.

Forbush commented that the Michigan Court of Appeals defined eavesdropping in *Sullivan v. Gray*, 342 N.W. 2d 58, 60-61 (Mich. Ct. App. 1982). The court ruled a participant in a private conversation may record it without violating the statute because the statutory term "eavesdrop" refers only to overhearing or recording the private conversations of others. She said from a federal context, the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511(2)(c), provides that recording conversations is not unlawful if one of the parties consents. Since the officer is one of the parties in an exchange with a citizen and brings a recording device, the officer just is another person involved who can record the conversation.

Places

Based on State and federal law, recordings can be made as long as one person consents. An officer wearing a body worn camera is the person participating in the conversation who is consenting to the recording. There is no expectation of privacy when a person is in a public place or a place open to the public and not in a place that is one in which the individual has a reasonable expectation of privacy. Examples of private places are homes, curtilage, a public restroom, changing/dressing or locker room and private offices. A private place can also be places that seem reasonable in "public norms". But quoting the watershed case on privacy, *Katz v. United States*, 389 US 347(1967), Forbush said the U.S. Supreme court ruled "expectation of privacy does not extend to "[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection." She opined that based on those remarks, a person who is in the presence of a police officer should have no reasonable expectation of privacy.

The Rules of Search And Seizure Apply, But Not To Recording

Forbush said the reasonable expectation of privacy derives from the Fourth Amendment to the U.S. Constitution. According to her, the courts have consistently ruled that when "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred. *United States v. Jones*, 132 S.Ct. 945, 950-951, n. 3, 181 L.Ed.2d 911 (2012). She said in *Katz* the U.S. Supreme Court ruled that the Fourth Amendment

protects people from unreasonable searches and seizures by the government of persons or objects in which they have a subjective expectation of privacy that seems reasonable in public norms. In brief, *Katz* involved FBI agents placing an electronic eavesdropping device on the outside of a telephone booth that Katz used to place illegal bets and get gambling information. Based upon information recorded from his phone calls, Katz was convicted of federal anti-gambling law violations. Katz appealed the conviction claiming, in part, that his phone conversations were recorded illegally.

The U.S. Supreme Court agreed and ruled whatever you try to keep private, even in a place accessible to the public, like a telephone booth, may be protected. The Court said “To qualify for Fourth Amendment protection, your expectation of privacy in the place to be searched or the items to be seized must be both:

- Subjectively reasonable, meaning that you must actually expect some degree of privacy in the place or thing; and
- Objectively reasonable, that is, the expectation of privacy is one that society is willing to recognize as reasonable”

Forbush commented that although officers can not intrude on a place of privacy, in *Hoffa v. United States*, 385 U.S. 293 (1966), the U. S. Supreme Court ruled that a defendant generally has no privacy interest in that which he voluntarily reveals to a government agent. She also pointed to *United States v. White*, 401 U.S. 745 (1971) where the U. S. Supreme court ruled that recordings made using concealed radio transmitters worn by informants and transmitted to the police do not violate the Fourth Amendment and no warrant is required.

Referring to *Horton v. California* 496 U.S. 128 (1990), Forbush said the Plain View Doctrine, an exception to the warrant requirement, establishes that officers can seize items they observe and immediately recognize as evidence or contraband. She added, for the exception of plain view to be valid, the officer’s presence in the area that the Fourth Amendment protects must be lawful.

Combining the eavesdropping statutes, informant cases, and plain view doctrine line of cases, Forbush opined, allows law enforcement officer who enter or are invited to enter an area where a person has a reasonable expectation of privacy while wearing an activated body worn camera to record that activity. A question, however, may still arise as to whether the recording can be used as evidence should enforcement action be taken as a result of the officer being in that place of privacy

Must Have Standing to Object

So, what happens if an officer comes to a location that is protected under the Fourth Amendment and the officer is told he cannot enter unless the body camera is turned off? Forbush said there is nothing in the law today that compels an officer to turn off a recording device no matter where they are. A person can deny entry into the protected area and, unless there are articulable exigent circumstances, the officer must get a warrant before proceeding. (See LEAF Newsletter, August 2011, *Dispatch Told Me, So It Must Be True! An Officer’s Responsibility When Dispatched to an Incident* and December 2011, *You Can’t Just Walk In A House! Without a Warrant, Consent, or Exigent Circumstances it is a Constitutional Violation.*)

Forbush noted that people cannot claim a Fourth Amendment protection unless they possess a personal interest in the item or place being entered and searched or in any items being seized. To object, people must have “standing.” This requires people to exercise lawful dominion over the place where they may expect to have a reasonable expectation of privacy. If they are a person of standing, barring exigent circumstance, they can give or deny consent for an officer to enter or to search a location without a warrant. Even if officers are mistaken about a person’s standing and enter and search, Forbush said the U.S. Supreme court in *Illinois v.*

Rodriguez, 497 U.S. 177 (1990) said an officer's reasonable belief that the party has common authority will validate the search, even if that belief is mistakenly relied upon.

Further, it is important that, without exigent circumstances, officers ensure they have a positive response from a person of standing to enter a home or other location where there is an expectation of privacy. Officers should know that they bear the burden of showing, by a preponderance of the evidence, that the totality of the circumstances supports a conclusion that consent was given voluntarily. *U.S. v Mendenhall*, 446 U.S. 544 (1980) Forbush went on to say that in *United States v. Worley*, 193 F.3d 380, 386 (6th Cir.1999), the Sixth Circuit Court of Appeals ruled "Moreover, we note that not any type of consent will suffice, but instead, only consent that is "unequivocally, specifically, and intelligently given, uncontaminated by any duress and coercion." Forbush was vehement in her position that consent to enter a place where there is an expectation of privacy must be recorded by the body worn camera.

Included in those areas where there is a reasonable expectation of privacy is the curtilage. Forbush explains that in *Oliver v. United States*, 466 U.S. 170, 180 (1984) the U.S. Supreme court defined curtilage as an area immediately surrounding a house or dwelling if it harbors the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" She said in *United States v. Dunn* 480 U.S. 294 (1987) the U.S. Supreme Court said that four factors should be considered in determining the curtilage:

1. The proximity of the thing to the dwelling;
2. Whether the thing is within an enclosure surrounding the home;
3. The purpose of the thing;
4. What steps, if any, the resident took to protect the thing from observation/ access by people passing by.

Officers must be conscious of the privacy rights of individuals depending on where they are located when officers encounter them. Forbush again reiterated, barring exigent circumstances, officers must have consent to enter this area and that consent should be recorded. She continued by explaining that *Oliver* also confirmed that areas away from the home and curtilage that are unoccupied and undeveloped are considered open fields. In open fields, there is no expectation to privacy even if the property is obviously private.

We Can Record Anywhere, So What About Privacy?

The issue of recording in a place of privacy is a matter of law and apparently is not as controversial as what is done with the recording once it is produced. Most police departments that use recordings require officers to document when they have recorded in association with an incident. It is either evidence, a special circumstance that is thought to be important, or an opportunity for training material. At some point, officers download the data to a storage device where it is maintained for a period of time, usually determined by some type of retention policy or statute, and then destroyed to make room for additional recordings. Unless something necessitates the video being viewed, it most will likely be destroyed at the end of the retention period. Forbush recommends due to the three-year statute of limitations, the recordings should be retained for a period of forty-two months.

According to Forbush, major issues that departments must reconcile seem to arise when the video is viewed because it is then that the responsibility to protect the privacy rights of the people that have been recorded comes into play. In her opinion, departments must recognize, based on privacy concerns, that the responsibility is theirs. Additionally, viewing should be on a "need to view" basis and those authorized to view the recordings must be trained on the privacy rules. Given the number of regulations and statutes that require information to be protected an effective policy and training is essential. Examples are the Social Security Protection Act, Health Insurance Portability and Accountability Act of 1996 (HIPAA), Americans With

Disabilities Act (ADA), Family Educational Rights and Privacy Act (FERPA), Driver's License Protection Act, Michigan Public Health Code AIDS/HIV Confidentiality, Michigan Mental Health Code, Michigan Crime Victim Rights Act, and LEIN/CJIS Regulations .

A second area of concern is that some recorded information might be considered proprietary. Proprietary information could be a trade secret, secret formulas, processes or system used in production or reveals the interworking's of a business or operation. Companies have a stake in keeping that information private. This information can easily be inadvertently gathered while officers are responding to a call or when doing an investigation. If revealed to the wrong people the information could cause economic damage to the company. And, finally, law enforcement executives should recognize that there are times when officers will record things that are private and do not need to be seen or heard by anyone else.

Departments also need to be sensitive to an officer's privacy should they accidentally record private moments or conversations that are either embarrassing or not anyone's business. For the integrity of the program, the recordings should be redacted with documentation of the time stamp and reason for the removal. Only a commanding officer or their designee should be allowed to delete any recording. An audit of the removal process should be performed annually to determine the frequency for redaction requests and the reasons. Remedial training for the employees in the use of the equipment and a warning about the consequences of continued incidents is appropriate.

Freedom of Information Act

FOIA could pose a major challenge to the use of body worn cameras. Forbush said that it is important to remember that nothing in FOIA itself prevents a government from providing any information it is willing to disclose, but statutes, rules and good judgment should restrict what information a governmental entity can or should disclose. She points to the December 2002 LEAF Newsletter, *The Freedom of Information Act, Privacy Rights vs. Disclosure* as a good resource for understanding the issues involving FOIA and privacy. One of the important parts of FOIA is MCLA 15.243 (13) (1), which lists a variety of allowable exemptions from disclosure.

Forbush pointed to the Michigan Supreme Court in *Michigan Fed'n of Teachers & Sch. Related Personnel, AFT, AFL-CIO v. University of Mich.*, 481 Mich. 657, 680 (2008) which interpreted MCL 15.243(1)(a), the privacy exemption, to encompass two elements:

- 1) The information must be of a personal nature, and
- 2) The disclosure of the information must constitute a clearly unwarranted invasion of an individual's privacy.

Forbush said the courts evaluate whether to grant the privacy exemption based on the public interest in disclosure of the information. It may be justifiable to release information while still protecting the specifically private personal information or images of those officers come in contact with or are involved in an investigation and any sensitive information contained in the reports.

A recent Michigan Court of Appeals case, *Rataj v. City of Romulus* 2014 WL 4723476, Mich App, Sept. 23, 2014 centered on an internal investigation involving an assault. In the booking area after an arrest, a black officer was racially cursed and spat upon by a white prisoner who was then struck by the officer. The department investigated the incident after the black officer reported himself or striking the prisoner. The prisoner requested, in writing, that the reports and video of the incident be kept private and the department not release any information for fear of embarrassment, harassment and potential assault by co-workers of the prisoner because of his words and actions.

Forbush reported that the court ruled, using the two prong test found in *Michigan Fed'n of Teachers*, that: "Notwithstanding the personal and embarrassing information that is apparently depicted on the video recording, we conclude that the video would shed light on the operations of the RPD and, in particular, its treatment of those arrested and detained by its officers. These are matters of legitimate public concern. "[W]e cannot hold our [police] officials accountable if we do not have the information upon which to evaluate their actions." *Practical Political Consulting*, 287 Mich App at 464. " The court also quoted from *Practical Political Consulting* when it said "In all but a limited number of circumstances, the public's interest in governmental accountability prevails over an individual's, or a group of individuals', expectation of privacy."

The court went on to say: "Like the video recording itself, the names of the citizen and officer involved in the assault were withheld under the privacy exemption of MCL 15.243(1)(a). In the absence of special circumstances that are not present here, an individual's name is not "[i]nformation of a personal nature" within the meaning of MCL 15.243(1)(a). Because the names of the citizen and officer are not [i]nformation of a personal nature," the names are subject to disclosure and there is no need to consider the second prong of the privacy exemption."

Forbush pointed out that the court did keep some personal information private under FOIA by ruling:" In contrast, we conclude that the other personal information redacted from the incident report was exempt from disclosure under FOIA. Home addresses, dates of birth, and telephone numbers typically constitute information of a personal nature within the meaning of the privacy exemption. And for purposes of the second prong of the privacy exemption, our Supreme Court has held that the disclosure of such information "would reveal "little or nothing' " about a governmental agency's conduct, nor would it further the stated public policy undergirding the Michigan FOIA." This other personal information pertaining to the citizen and officer was exempt from disclosure under MCL 15.243(1)(a) and was therefore properly redacted from the incident report."

Michigan Fed'n of Teachers is important because it establishes that the names of officers and citizens are not information of a personal nature, and, therefore, any person the officer encounters will likely not be exempted from disclosure. Forbush said the question of releasing videos of encounters or any other police activity will likely be decided after the court's case by case review to determine whether the recording reveals anything about a governmental agency's conduct that are matters of legitimate public concern and subject to the provisions of the FOIA. The next privacy issue concerns establishing what information or video is a clearly an unwarranted invasion of an individual's privacy. The case does not give guidance on this question because the video was taped in a public location.

Having to review and redact video and audio of a variety of incidents can become time consuming and costly. Forbush pointed out that law enforcement agencies must comply with the FOIA's strict timetables and procedures. In addition, she said, the department will have to defend its decision in court if the refusal to provide information or the documented explanation of the application of an exemption is challenged by the requester. In addition, should the requester prevail in the dispute, the municipality may have to pay costs and penalties. (See LEAF Newsletter, May 2013, *FOIA: Still Complicated and Potentially Costly!*)

Briefly About Right Of Privacy Of Personal Information

Forbush said the issue of invasion of privacy was raised in *Lambert v Hamilton County*, 517 F.3d 433 (6th Circuit, 2008) In this case, the court used the current standard of: ...whether the party alleging an invasion of privacy has a legitimate expectation of privacy in the information in question. The case involved a complaint of privacy rights under federal law. In this case, Lambert brought a 42 USC §1983 civil rights action because the County Clerk's office posted a traffic citation that contained Lambert's personal information, including social security number, on the Web as part of a program designed to reduce the need for going to court. It

seems that some other web surfers had also found the web site and used the information to steal Cynthia Lambert's identification. Lambert filed suit claiming the Clerk's policy and practice violated her Fourteenth Amendment right to privacy and to substantive and procedural due process as well as her Fourth Amendment right to be free from unreasonable searches and seizures. She also alleged she had suffered "economic damages, damages to her personal credit rating, and damage to her reputation" because of the policy.

The Sixth Circuit Court recognizes an informational-privacy interest of constitutional dimension in only two instances:

(1) where the release of personal information could lead to bodily harm (*Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998).

(2) where the information released was of a sexual, personal, and humiliating nature (*Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998).

The Sixth Circuit, according to *Forbush*, assessed informational privacy claims on whether the asserted privacy interest implicates a fundamental right. The Court ruled the protection of a person's credit is a concept relating to one's finances and economic well-being, one that by its very nature bears no relationship to the kinds of interests that are "implicit in the concept of ordered liberty." The Court affirmed the District Courts dismissal of the case.

According to *Forbush*, this case protects a municipal entity should they make an error and release information that is considered private and otherwise protected as long as the damages are financial. With the Sixth Circuit keeping the constitutional limits to the narrow interpretations they have taken in *Kallstrom* and *Bloch* there is still some protection at the federal level to stay out of civil rights violations concerning privacy expectations.

Going Forward

Forbush commented that the issue of the use of body worn cameras is going to evolve as their use becomes more mainstream. She said departments should focus on developing a policy that speaks to the expectation of the community in maintaining their privacy balanced against the intended purpose of recording encounters. Top municipal management should issue a policy statement to guide the FOIA Coordinator in the use of the exemptions found in the Freedom of Information Act as it relates to the release of information and recordings.

She went on to reiterate that police officers should receive training in the department's policy and management's expectation for using the camera. The training should also include a clear understanding of the limitations imposed upon and the discretion allowed officers in activating the camera. Consideration should also be given to protecting the officers' privacy through restrictions on where the camera can be used and the ability to report mistakes for consideration of video deletion by the department. As with other programs, a regular audit process should be established to ensure compliance with the recording requirements and to monitor the behavior of the officers when interacting with the public.

In the near future, LEAF expects to publish a Sample Policy in the Michigan Municipal League LEAF Manual for Law Enforcement Risk Control found at mml.org, under the Insurance tab. The Manual is available to members of the MML Liability and Property Pool and/or the Workers Compensation Fund and requires a password. Members who have not enrolled in the Manual, at the website, click the green Member Login box and the red "Don't have an account?" line to complete the form to request approval.

Are you a MML Insurance Program Member?

Go to the League's online Law Enforcement Risk Control Manual, [now compatible with any browser](#), to establish a new account using the streamlined login process. Go either to <http://www.mml-leaf.org/> or <http://www.mml.org>, under the Insurance tab/LEAF. Click the green Member Login box. At the Login screen click "Don't Have an Account". To add to the ease of use, the manual now contains a complete keyword search function.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers' Compensation Fund
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